No. 291

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1921.

LOUISIANA & PINE BLUFF RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the Western District of Arkansas.

BRIEF FOR APPELLANT.

LUTHER M. WALTER,
JOHN S. BURCHMORE,
Solicitors for Appellant.

September 17, 1921.

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INDEX.

Table of Cases.

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Appeal from the District Court of the United States for the Western District of Arkansas.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is an appeal from a decree of the District Court of the United States for the Western District of Arkansas, dismissing the bill of complaint for want of equity. The bill of complaint was brought to set aside and annul an order of the Interstate Commerce Commission dated June 10, 1919, fixing the compensation of appellant for transporting carloads of lumber from the mill of the Union Sawmill Company at Huttig, Arkansas, to the connection between the appellant and the Missouri Pacific Railway at Dollar Junction, Arkansas, at $3.00 per car.

The case, broadly speaking, involves the right of the Commission, in fixing distance rates and divisions of rates on lumber, to exclude the distance the car is hauled by the appellant to and from track scales. If the distance to and from the track scales is included, the total haul by the appellant exceeds three miles and under the scale of tap line divisions, fixed by the Commission, appellant was entitled to 1½ cents per hundred pounds. If the distance to and from the scales is properly excluded, the scale rate of $3.00 per car was properly applied.

The District Court, in a memorandum opinion (Rec., 44), dismissing the bill, interpreted and applied the Commission's decision and order as contemplating a direct haul from the loading point to the junction point "without any diversion not made necessary to safely and properly reach such junction point," and declined to review the finding of the Commission that "the evidence does not show that it is necessary that the shipments be weighed by the tap-line rather than by the trunk line."

By the decision in *The Tap Line Case*, 23 I. C. C. 277, to which appellant was a party, the Interstate Commerce Commission held that the appellant was not a common carrier, and by its order of May 14, 1912, prohibited the St. Louis, Iron Mountain & Southern Railway Company and its connections from paying allowances to appellant out of the joint interstate rates on lumber and other forest products. The decision and order of the Commission in *The Tap Line Case* was reversed and set aside by this court in its decision of May 24, 1914, (*The Tap Line Cases*, 234 U. S. 1.) On July 29, 1914, the Commission handed down its opinion upon rehearing and further argument, 31 I. C. C. 490, finding that appellant is a common carrier and vacating and setting aside its prior order of May 14, 1912. The Commission found, with reference to each of the tap-lines parties to the proceeding that joint

rates should be restored and re-established and that divisions should not exceed the following maximum amounts: for switching a distance of one mile or less from the junction, $2 per car; over one mile and up to three miles from the junction, $3 per car; on shipments from points over three miles, and not more than six miles from the junction, 1½ cents per hundred pounds. Increased divisions were allowed for increased mileages. The Commission then provided in its order that the divisions allowed were the net amounts that may be paid out of the trunk line rates from the junction and should be applied to all interstate shipments of lumber and forest products moving from points on the tap lines between May 1, 1912, to the date the through rates and divisions were made effective.

The Commission, in its report, required the trunk lines to file with the Commission a copy of their division sheets with each of the tap lines, showing the distance in miles from each station or shipping point to the junction with the issuing carrier. The tap lines were required to file a copy of their distance tariff or table of distances from all shipping points on their respective lines to the junctions with the connecting carriers.

In accordance with said decision and order of the Commission, the St. Louis, Iron Mountain & Southern Railway Company filed joint rates and re-established through routes for the transportation of lumber and other forest products from points on the line of the appellant at Huttig, Arkansas, over appellant's line, through Dollar Junction, Arkansas, and thence over the line of the St. Louis, Iron Mountain & Southern Railway Company to various destinations in other states of the United States, and filed division sheets making effective the allowances or divisions to the appellant established by the said order of the Commission on July 29, 1914. Representatives of the

Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company measured the distance over which lumber and other forest products were hauled by the appellant from loading points at Huttig and Dollar Junction, Arkansas, and found the same to be in excess of three miles. A division sheet in accordance therewith is reproduced. (Rec., 8.)

After supplemental investigation in I. & S. Docket No. 11 the Commission handed down an order and opinion, 40 I. C. C., 470, holding that while the actual distance appellant hauled lumber and other forest products from the Union Sawmill at Huttig, to Dollar Junction, exceeded three miles, a portion of the haul was to and from the track scales, where the lumber was weighed by the appellant, and that deducting this so-called "out-of-line or diverted movement to a track scale," the distance said lumber and other forest products was transported by the appellant was less than three miles and therefor appellant was entitled only to $3 per car as an allowance or division out of the joint through rate. Appellant refused to accept said $3 per car and insisted upon receiving 1½ cents per hundred pounds for the haul from Huttig to Dollar Junction. Thereupon the Missouri Pacific Railroad Company, successor to the St. Louis, Iron Mountain & Southern Railroad Company, filed its petition with the Commission for an order to give effect to the findings announced by the Commission in said decision and report, 40 I. C. C., 470.

Under a rule to show cause why such order should not be entered, appellant requested the Commission to give further oral argument, which was granted. Upon reargument, the Commission announced its decision June 10, 1919, 53 I. C. C. 475. The Commission referred to the contentions that the haul from the Union Sawmill to the scale, and thence to the junction with the Iron Mountain,

a distance of 3.25 miles, was actually necessary in the handling of the lumber, and that the Louisiana & Pine Bluff was entitled to compensation for services based on the entire distance, and found "The evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line." (Rec., 6.) The Commission further stated that it could find no sufficient reason for modifying the findings stated in its previous report. It did, however, in line with increased rates, permit an increase of 50 cents per car for switching three miles or less, and one-half cent per hundred pounds on traffic hauled more than three miles.

The Commission thereupon entered its order of June 10, 1919 (Rec., 7), finding the distance from the mill of the Union Sawmill Company to the Missouri Pacific at Dollar Junction is 2.41 miles.

Thereafter appellant filed its petition for modification of such order (Exhibit A to the bill of complaint) (Rec., 14). On December 1, 1919, the Commission denied the prayer of said petition. Thereupon, petition was filed in the District Court of the United States for the Western District of Arkansas, to set aside and annul the said order of June 10, 1919.

By consent of the parties the case was heard on final submission upon the pleadings before Honorable Kimbrough Stone, Circuit Judge, and Honorable Jacob Trieber and Honorable Frank A. Youmans, district judges, sitting as a district court.

The question presented by this case is whether the Interstate Commerce Commission lawfully may deny appellant compensation for the necessary haul of a carload of lumber to and from the track scales.

ASSIGNMENTS OF ERROR.

The District Court erred:

I. In dismissing the bill.

II. In finding and deciding that the basis of the decision by the Interstate Commerce Commission in the order and decision complained of in the bill herein, was "that it had not been shown that it was necessary for the tap line rather than the trunk line to take this weight."

III. In finding and deciding that the Commission interpreted and applied its order of July 29, 1914, 40 I. C. C., 470, which established the basis of tap line charges "as contemplating a direct haul from the loading point to the junction point without any diversion not made necessary to safely and properly reach such junction point."

IV. In finding and deciding that the District Court cannot review the finding of the Commission, 53 I. C. C., 475, "the evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line."

V. In finding no error of fact in the findings of the commission complained of in the petition, nor any misapplication of law thereon.

ARGUMENT.

The District Court erred:

I. In dismissing the bill.

II. In finding and deciding that the basis of the decision by the Interstate Commerce Commission in the order and decision complained of in the bill herein, was "that it had not been shown that it was necessary for the tap line rather than the trunk line to take this weight."

IV. In finding and deciding that the District Court cannot review the finding of the Commission, 53 I. C. C., 475, "the evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line."

In the opinion of the Commission (Rec., 6), it will be observed the foregoing finding that "the evidence does not show it is necessary that the shipments be weighed by the tap line rather than by the trunk line," is merely a statement of the conclusion by the Commission that there is an absence of evidence as to which railroad should weigh the lumber, whether the Louisiana & Pine Bluff or the Missouri Pacific Railroad Company. The testimony before the Commission discloses that the Louisiana & Pine Bluff, the appellant, for years had weighed lumber at the track scale at Huttig; that this practice had been in effect since long before the institution of the Tap Line Case; that the scales had been located at Huttig at the most convenient place, and that during all the period prior to the rendition of the first decision by the Commission in the Tap Line case appellant had received for its services out of the joint through rate, an allowance of 5 cents per hundred pounds. There is, therefore, complete evi-

dence upon which to find that the manner in which appellant performed its services in no way constitued a device by which to secure an excessive portion of the joint through rate. The interest which owned the Union Sawmill Company had constructed a line of railroad 44 miles long, known as the Little Rock & Monroe Railway, extending from a connection with the Iron Mountain at Felsenthal to Monroe, passing through Huttig. Immediately after the completion of this line of railway in 1905, it was sold to the Iron Mountain, with the right reserved to the proprietary interest to operate its trains over the tracks so conveyed to the Iron Mountain, 23 I. C. C., 584. The scales used by appellant are located on the rails sold to the Iron Mountain and over which the proprietary interests had reserved the right to operate.

In January or February, 1915, new scales were established, because the old ones had been condemned by the Western Weighing & Inspection Bureau, on account of the faulty darinage facilities. The Missouri Pacific Railway Company fixed the new location of the scales 484 feet farther south than the former location (Rec., 27). Exhibit A to the bill of complaint contains a map of the track and shipping points, showing the location of the old scales and of the new scales. A car loaded at the plant of the Union Sawmill Company would move from point "G" to "H," a distance of 855 feet, and after passing the switch points would be moved to "E," where the scales were formerly located, a distance of 2190 feet, and after being weighed would be moved from "E" north to "F," 14,034 feet, a total distance of 17,079 feet, or 3.25 miles. The additional distance to the present location of the scales is 484 feet, and with a return movement of like distance, the total haul from "G" to "F" through the present location of the scales is 18,047 feet, or 3.42 miles.

Shipments of lumber from the Wisconsin Lumber Company's plant, loaded at point "A," would move from "A" to "B" to "C" to "D" to "E" to "F," a total distance of 17,952 feet, or 3.4 miles, and for this haul the Commission allowed a division of 1½ cents per hundred pounds; the distance from "D" to "E" and return, of 840 feet, if subtracted from the total haul, still leaves an ample margin over the three miles.

No contention is made, or can be made, that the location of the scales at point "E," or at their present location, was designed to increase the haul to the appellant, or in any way to constitute a device to secure an increase division. The average carload of lumber weighs from 48,000 to 50,000 pounds per car. The difference between $3 per car and 1½ cents per hundred pounds, thus appears to be from $4.20 to $4.50 per car.

In January, 1912, the Interstate Commerce Commission on its own motion instituted an investigation into the weighing of carload freight by carriers, and announced its conclusion. *In re Weighing of Freight by Carrier*, 28 I. C. C., 7. After a careful investigation into the facts and circumstances connected with the weighing of carload freight, the Commission reached a conclusion which will be found at page 36 of said decision:

> "In our opinion every carload of freight, where track scales are relied upon to determine the weight upon which freight charges are to be assessed, should be weighed within 50 miles of the point of origin ordinarily."

Following that decision of the Commission, the carrier prepared what is known as the National Code of Rules Governing Weighing and Re-Weighing of Carload Freight, which code was endorsed by the Commission on June 9, 1914. Rule 3 of said code deals with "Weights—how ascertained," and section "A" of said rule is as follows:

"When track scale weights are used for the assessment of freight charges, weighing must be done by or under the supervision of the carriers or their representatives, or under properly supervised weight agreements."

Rule No. 4 in part is as follows:

"Weights—where ascertained. Carload freight should be weighed at point of origin or as near thereto as practicable."

The only track scales at Huttig, Arkansas, are those which are used by appellant in the weighing of lumber, as outlined heretofore. Lumber delivered by the appellant to the Missouri Pacific Railroad company at Dollar Junction, Arkansas, moves to interstate destinations, either via Collinston, Louisiana, or McGehee, Arkansas. Lumber moving via Collinston moves south from Dollar Junction to Collinston and thence north through Monroe to McGehee. The first scale is at McGehee, a distance of 111 miles from Huttig. If the lumber moves north from Dollar Junction, via Gurdon, Arkansas, and thence through Little Rock, the first scales reached are located at Gurdon, 100 miles from Huttig. If the lumber should move, as but little does move, south from Dollar Junction, to Monroe, Louisiana, the first scales are located at Monroe, a distance of 45 miles. At that point the track scales are three-fourths of a mile north of the freight yard, and the yard engine would have to take the loaded car three-fourths of a mile north to the scales and three-fourths of a mile south to the yard, where the car would be made up into a train. There would, therefore, be an additional haul at Monroe of 1½ miles in order to weigh the car. (Rec., 18.)

Section 1 of the Interstate Commerce Act provides that the term "railroad" shall include all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement or lease, and

also all switches, spurs, tracks, terminals and terminal facilities of every kind, used or necessary in the transportation of property. The term "transportation" includes locomotives, cars and other vehicles, vessels and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract for the use thereof, and all services in connection with the receipt, delivery and elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported. Clearly under these statutory definitions all of the track over which the car of lumber is handled, regardless of who owns the track, is part of the railroad to be included in the distance upon which any mileage scale of rates must be applied. Likewise, all of the instrumentalities, including the scales and all the services including that of weighing the carload, are included in the term "transportation."

In the decision of the Commission "*In re Weighing of Freight by carrier,*" *supra,* the Commission exhaustively covered the field of practices of carriers in the location and operation of track scales and found that the fundamental basis for determining the revenues of the carriers lay in obtaining correct weights. The weight of an article transported and the rate of freight per hundred pounds or per ton, determine the amount paid by the shipper. An error in either of these two factors reflects itself in the total charges. Clearly, therefore, the weighing of freight is just as much a practice subject to the Interstate Commerce Act as is the fixing of the freight rate.

In a later case, *Detroit Coal Exchange* v. *Michigan Central,* 38 I. C. C. 79, at page 84, the Commission held that the haul to and from the track scales is properly to be included in the total distance for which the carrier is entitled to compensation, the Commission there saying:

> "The several short operations which are necessary to take a car to and from the scale constitute one complete service, just as the several operations necessary to move a car from one industry to another constitute one complete service. The weighing operation is merely one link in the weighing movement, and is not unlike a number of individual operations incident to the average switching movement."

Thus the Commission by formal decision has held that the transportation of freight to and from track scales should be performed by the originating carrier, and that such haul is part of the service for which the carrier is entitled to compensation. But when the Commission came to apply the rule to appellant it declined to grant compensation for the movement to and from the track scales.

The tap line record showed that of 103 tap lines under investigation, 20 weighed outbound lumber, and 13 had no scales available; as to the remaining 70 tap lines the record is silent. Your petitioner, therefore, is singled out from all other common carriers. An arbitrary ruling is applied without any justification whatever.

By its own rulings, decisions and opinions the Commission has convicted itself of arbitrary action in the present case. In the absence of evidence that the Missouri Pacific should weigh the lumber, with the evidence clearly showing that for many years prior to the Tap Line decision the appellant had performed the service, with the Commission in its weighing investigation finding that the inital carrier should weigh the freight, it cannot be denied that the action of the Commission in this case not only was not based on evidence, but was contrary to the evidence and arbitrary.

The District Court erred:

III. In finding and deciding that the Commission interpreted and applied its order of June 29, 1914, 40 *I. C. C.*, 470, *which established the basis of tap line charges "as contemplating a direct haul from the loading point to the junction point without any diversion not made necessary to safely and properly reach such junction point."*

The opinion of the court quotes from the decision of the Commission, 40 I. C. C., 470, in which it is stated that the appellant, in order to bring about an increase in its earnings, claims to be entitled to compensation "for an out-of-line haul to the scale track of nearly a mile." We have already shown that the total movement from the switch point of the scale track to the scale and return is only 840 feet and to the new location and return only 1,808 feet. This distance is far short of "nearly a mile." The statement of the Commission is obviously extravagant. The quotation in the opinion of the court below that the allowance had been "fixed by the Commission for the distance covered by the direct movement from the mill to the junction" (Rec., 45), can not furnish a basis for a finding that the haul to the scales for weighing is "not made necessary to safely and properly reach such junction point." We have seen that the Commission's order definitely prescribes a mileage scale of divisions or allowances for switching services "from points on the line * * * a distance of one mile or less from the junction." Nothing has been said by the Commission in any opinion or order in the Tap Line cases which in any way provided that the haul should be computed via any particular line of track. The Interstate Commerce Act defines "transportation" as including weighing. The Commission, in its decision in *Detroit Coal Exchange* v. *Mich-*

igan Central, supra, has definitely stated that a carrier is entitled to compensation for the weighing, including the necessary switching to the scales of carload freight.

The District Court, therefore, was in error in its finding that the Commission had interpreted and applied its order establishing the Tap Line charges as contemplating "a direct haul from the loading point to the junction point, without any diversion not made necessary to safely and properly reach such junction point." In any event, "properly to reach such junction point" contemplates that the car, with its load of lumber, should be delivered at the junction point accompanied by such papers and such information as will enable the connecting carrier, the Missouri Pacific, to transport the freight to its final destination and to collect the charges. The Interstate Commerce Act deals primarily with charges for transportation or compensation to be paid by the shipper to the carrier. That compensation depends as much on the weight of the car as on the rate per hundred pounds. The tariff on file with the Commission shows the rate. The weighing of the carload is the only manner in which the other factor can be ascertained. It is, therefore, essential to the proper delivery of the car to the connecting line that the information as to the weight be furnished to the connecting carrier.

The District Court erred:

V. *In finding no error of fact in the findings of the Commission complained of in the petition, nor any misapplication of law thereon.*

Under the four assignments already discussed, we have shown that the Commission has arbitrarily denied appellant compensation for the transportation from switch point at "D" to the scales at "E" and return to "D,"

The total service performed by the appellant in weighing the lumber is not limited to hauling the car 840 feet to and from the former location of the scales at "E," or 1,808 feet to and from the present location of the scales, but includes as well the service of weighing the car after it is placed on the scales. This weighing service is performed by an employe of the appellant, who is a sworn weigh-master, under the jurisdiction of the Western Weighing and Inspection Bureau. Weighing is one of the services included in the term "transportation" which it is the duty of the appellant under Section 1 of the Interstate Commerce Act to furnish upon reasonable request. Denial of compensation for this service is therefore an arbitrary act on the part of the Commission and one beyond its authority to enforce.

This court has frequently considered cases involving the validity of orders of the Commission. Appellant does not question that if a complaint is made to the Commission, or if an investigation has been instituted by the Commission concerning the reasonableness of the division of the joint through interstate rate, that body has authority to examine the subject, and if it finds the division complained of is in and of itself unreasonable, having regard to the services rendered, to fix a new and reasonable division. Appellant does not deny that where the Commission exercises such authority upon a full record its finding is not subject to review by the court.

Interstate Commerce Commission v. *Illinois Central*, 215 U. S. 452; 54 L. Ed. 280.

In other words, this appellant fully concedes that an order of the Commission made in a proceeding such as that before the Commission in the Tap Line cases, I. & S. Docket 11, is not open to attack in the courts, so long as the Commission keeps within the powers conferred by the statute. The court should set aside the order of the

Commission complained of herein, because that order is in excess of the power conferred upon the Commission. That the order was in excess of the power conferred upon the Commission is to be determined by the substance and not the mere form of the order. In other words, this court will determine whether, under all the circumstances disclosed of record, the Commission fixed not merely the reasonable division out of the joint through rate, but acted in the exercise of an authority not conferred upon it by law. The Commission acted not merely to correct an unjust division of the through rate, but made the order complained of upon the theory that the power was possessed by the Commission to set aside a division which it had found to be just and reasonable for a certain length of haul and to substitute a rate which it had found reasonable for a shorter haul. In other words, appellant charges that the action of the Commission was arbitrary and constituted an abuse of power.

In the case of *Southern Pacific Company et al.* v. *Interstate Commerce Commission*, 219 U. S. 433, 55 L. Ed. 263, this court considered the action of the Interstate Commerce Commission in making an order which was complained of on much the same grounds as that invoked by appellant herein. In that case, the Commission had, after a full investigation upon complaint, reduced a rate of $5 per ton for the transportation of green common rough fir lath and lumber and forest products from Willamette Valley points in Oregon to San Francisco and Bay points in California. A rate of $3.10 per ton had been in effect from about 1898 to 1907; the Commission established a rate of $3.40 a ton from certain points in the Willamette Valley and $3.65 per ton from certain other points. The case was heard upon amended bill, the answer, the replication of the plaintiffs and the evidence introduced before the

Commission. The Circuit Court entered a decree dismissing the bill upon the theory that, as the Commission found that the rate fixed by it gave some remuneration upon the cost of operation and was not, therefore, confiscatory, there was no power to interfere. The opinion by the late Chief Justice White points out that the Commission had based its decision not upon the amount of the rate which was just and reasonable for the services to be performed, but because of some doctrine of estoppel, by reason of the long continuance of the rate, the fact that lumber companies had bought their timber, built their mills and engaged in the business upon the faith of the continuance of a rate of $3.10. That this is so was shown by quotations from the transcript of record before the Commission, 55 L. Ed. 287. We quote from that decision of this court at some length, page 289:

> "Although we find the record replete with statements made during the course of the hearing by counsel for both parties, and certainly by one or more of the commissioners who were present at the hearing, which we think leave no doubt as to the nature and character of the power exerted, we do not pursue the subject further, since we are of opinion that the face of the opinion and the order so additionally serve to make manifest the situation as to render it unnecessary to do more than briefly advert to those subjects. While it is true that the opinion of the Commission may contain some sentences which, when segregated from their context, may give some support to the contention that the order was based upon a consideration merely of the intrinsic unreasonableness of the rate which was condemned, we think when the opinion is considered as a whole, in the light of the condition of the record to which we have referred, it clearly results that it was based upon the belief by the Commission that it had the right, under the law, to protect the lumber interests of the Willamette Valley from the consequences which it was deemed would arise from a change of the rate, even if that change was from an unreasonably low rate, which had prevailed for some time, to a just and reasonable charge for

the service rendered for the future. Manifestly, this was deemed by the Commission to be the power which was being exerted, since Mr. Commissioner Harlan, joined by the chairman of the Commission, dissented on the ground that the order was an exertion of a power not possessed, to give effect to a supposed equitable estoppel, and no language was inserted in the opinion to indicate to the contrary. The obvious impression as to the nature and character of the power exerted, given by the very face of the opinion of the Commission, is shown by the syllabi to the official report of the opinion, which we copy in the margin.

Finally, the express exclusion of Portland from the benefit of the reduced rate, and the reasons given for the exclusion indubitably establish the character of the power exerted so as to exclude the possibility of holding that it was merely the exercise of the right to correct an unjust and unreasonable rate. We say this because, if the assumption be indulged in that the order was but the manifestation of the authority to correct an unreasonable rate, the traffic of Portland, in the absence of some lawful reason for excluding it, would be discriminated against by the order excluding Portland from the benefit of the reduced rate. We cannot, therefore, assume that the order was legal because it rests upon the power to correct an unreasonable rate and to substitute a reasonable rate, since to indulge in that assumption would at once beget the inevitable inference that the order was repugnant to the statute because of its discriminatory character. And the reasons given for the exclusion of Portland from the benefit of the reduction which the order made likewise leave no room for the conclusion that the reduction was based merely upon the finding that the tariff rate which was reduced was, considering the service rendered, in and of itself unreasonable."

So, in the present case, we find the Commission committing the same error of law. The Commission had already in the main Tap Line case, fixed as the maximum reasonable allowance for switching a distance over one mile and up to three miles, $3; and on movements over

three miles and not more than six miles, 1½ cents per hundred pounds.

On the haul of the non-proprietary lumber from the Wisconsin Lumber Company's mill to the scale for weighing and thence to Dollar Junction for delivery to the Iron Mountain, the Commission fixed an allowance of 1½ cents per hundred pounds, as the haul was more than three miles. But on the proprietary lumber, although actually hauled more than three miles, the Commission declined to allow 1½ cents per hundred pounds, and allowed only $3 per car. The reason given by the Commission is that it cannot include the distance hauled to and from the scales which when deducted left the haul at less than three miles. If the Commission had been proceeding to fix a just and reasonable maximum allowance for the switching preformed by this appellant, it would not have based its decision upon the sole point of whether the haul to and from the scales should be included in the distance for which compensation was to be granted. We cannot undertake to say why the Commission would deprive appellant of compensation for this haul. Suffice it to say that the Commission did deny the compensation. We assume that counsel for the Commission and for the United States will frankly admit that the action of the Commission was controlled solely by its view that appellant was not entitled to compensation for the service of moving the loaded car to and from the scales, because if the Commission had not reached this conclusion it would have included the service as being one for which the appellant was entitled to be paid. In the *Willamette Valley case, supra*, the Commission thought that the carrier was not entitled to increase the rate charged lumber shippers to what was a reasonable basis because of the promises which had been made that the rate would be maintained at $3.10. The two cases are on all-fours.

CONCLUSION.

The decree of the District Court was evidently based on the theory that the Interstate Commerce Commission is better informed as to the evil results which may follow from enjoining the order than is the court. Where, however, the action of the Commission, is so manifestly an abuse of power, is so clearly an attempt to deprive a railroad company of proper compensation for lawful transportation services, there is no room for assumption. By an arbitrary act without foundation either in fact or in law, this appellant has been deprived of compensation to which it is clearly entitled. The decree of the District Court should be reversed, with directions to enjoin and set aside the order of the Commission complained of.

Respectfully submitted,

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Sept. 17, 1921.

In Equity, No. 291.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

LOUISIANA & PINE BLUFF RAILWAY COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLEES.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

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OCTOBER, 1921.

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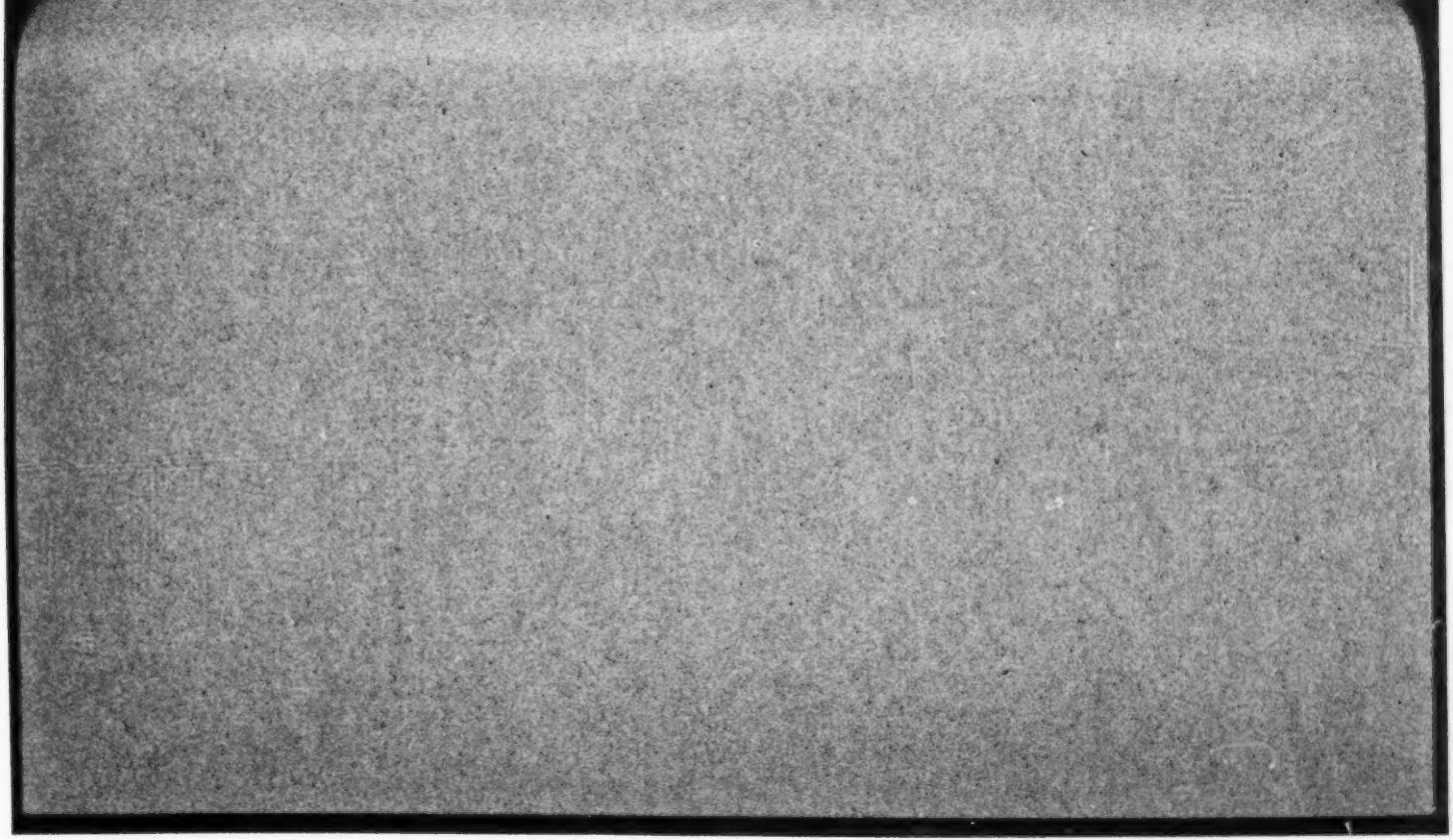

SYNOPSIS AND INDEX.

CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

LOUISIANA & PINE BLUFF Railway Company, appellant,
v.
THE UNITED STATES OF America and Interstate Commerce Commission, appellees.
} In Equity, No. 291.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

Appellant is a common carrier, subject to the provisions of the interstate commerce act. It owns and operates a standard gauge steam railroad extending from Huttig, Ark., to Dollar Junction, Ark., which connects at both of the points mentioned with the line of railroad of the Missouri Pacific Railway Company, successor to the St. Louis, Iron Mountain & Southern Railroad Company.

Appellant is a party to a proceeding before the Interstate Commerce Commission, hereinafter called the Commission, known as Investigation and Suspension Docket No. 11, *The Tap Line Case*. The original

report in that proceeding is *Tap Line Case*, 23 I. C. C., 277, decided April 23, 1912. On May 14, 1912, a supplemental report was made, 23 I C C., 549. In both of these reports the Commission described the various tap lines at some length, and also made certain general statements based on evidence of record regarding the tap lines as a whole. At pages 293 and 297 of the original report the Commission pointed out that each case must be considered on its own facts and "that no general rule or principle may be laid down that will do exact justice in all cases * * *." The findings of the Commission in respect of appellant appear at pages 583 to 587 of the supplemental report.

The Commission, on May 14, 1912, made an order, which was amended on October 30, 1912, designed to carry into effect the conclusions reached in the original and supplemental reports, *supra*.

Later, on July 29, 1914, the Commission made its second supplemental report in the proceeding, 31 I. C. C., 490. Among other things, it said:

> This matter comes before us again upon petitions, rehearings, and further argument, and upon the fundamental questions involved in the opinion and order relating thereto in *The Tap Line cases*, 234 U. S. 1.
>
> In our original and supplemental reports herein, 23 I. C. C., 277, 549, we found that certain of the tap lines that were parties thereto did not perform a service of transportation for their respective proprietary companies, either in the movement of the lumber of the pro-

prietary company from its mill to the trunk line, or in the movement of the logs from the forest to the mill; that this was a plant service with plant facilities; and that any allowances or divisions out of the rate on account thereof were unlawful and resulted in undue and unreasonable preferences and unjust discriminations. Other tap lines that were parties to the proceeding were recognized as performing a service of transportation with respect both to proprietary and nonproprietary traffic, and in those cases we authorized the reestablishing of through routes and joint rates, and fixed the divisions that might be paid by the connecting trunk lines to those tap lines out of the through rate. An order was issued in conformity with these findings. Later five of the tap lines, to which, as we had held, divisions could not lawfully be paid by the trunk lines, filed petitions in the Commerce Court, seeking to have the order of the Commission enjoined and annulled. The decree of that court vacated and set aside that portion of the order of the Commission wherein it was held that with respect to the product of the proprietary mills the five tap lines did not perform a service of transportation. From this order an appeal was taken to the Supreme Court of the United States.

In its opinion in the case above cited the Supreme Court held these five lines to be common carriers with respect both to proprietary and nonprietary traffic, and that the Commission had exceeded its authority in

condemning the divisions previously allowed to them out of the through rate as an attempt to evade the law and to secure rebates and preferences.

There were 57 tap lines to which, in its original and supplemental reports, the Commission refused to sanction allowances on the general grounds above stated; but although the appeal was taken to the courts on behalf of only five of these tap lines, nevertheless the rulings announced by the court extend in principle to all of them, and we have felt in duty bound to apply the rulings to the entire group.

* * * * *

With respect to each of the tap lines that are parties to this proceeding, the original orders of the Commission, and the orders subsequently entered, so far as they relate to through routes, joint rates, and divisions, will be vacated and set aside; and upon the facts of record, we conclude and find that all the through routes and joint rates in effect prior to May 1, 1912, between the trunk lines and tap lines named on the record should be restored and reestablished, and that the divisions out of the through rate on interstate shipments of lumber and forest products, from points on such of these tap lines as file tariffs and have otherwise complied with our accounting rules, etc., should not exceed the following maximum amounts: For switching a distance of 1 mile or less from the junction, $2 per car; over 1 mile and up to 3 miles from the junction, $3 per car; on shipments from points over 3 miles and not more than

6 miles from the junction, 1½ cents per 100 pounds; over 6 miles and not more than 10 miles from the junction, 2 cents per 100 pounds; over 10 miles and not more than 20 miles from the junction, 2½ cents per 100 miles; over 20 miles and not more than 30 miles from the junction, 3 cents per 100 pounds; over 30 miles and not more than 40 miles from the junction, 3½ cents per 100 pounds; over 40 miles from the junction, 4 cents per 100 pounds. These divisions are the net amounts that may be paid out of the trunk line rates from the junctions, and when the rates from points on the tap line are made by the addition of an arbitrary, such arbitrary shall accrue to the tap line.

* * * * *

The trunk lines will be expected to file with the Commission a copy of their division sheet with each of their respective tap-line connections, making effective the divisions fixed herein. The division sheet should show the distance in miles from each station or shipping point to the junction with the issuing carrier, in addition to the amount of the division. The tap lines should file with the Commission a copy of their distance tariff or a table of distances from all shipping points on their respective lines to the junctions with the connecting carriers.

The third supplemental report in *The Tap Line Case*, 34 I. C. C., 116, dealt with an alleged discrimination in the rates on hardwood lumber moving to the general markets of consumption from the mill

of the Wisconsin Lumber Company at Huttig, Ark., on appellant's rails. In the course of its opinion the Commission said:

> Without going into details of the various rate readjustments that have been made, it will suffice to say that at the time of the hearing the rates on hardwood lumber from the mill of the Wisconsin Lumber Company, on the rails of the Louisiana & Pine Bluff at Huttig, were 3 cents higher than the rates on hardwood lumber originating on the rails of the Iron Mountain at Huttig. In tariffs issued subsequent to the hearing the Iron Mountain named rates on hardwood from the mill of the Wisconsin Lumber Company on the rails of the Louisiana & Pine Bluff at Huttig 1½ cents higher than the rates on hardwood originating on its own rails at Huttig, while the rates on pine lumber from the mill of the Union Saw Mill Company at Huttig, which is owned by the interests that own the Louisiana & Pine Bluff Railway, were the same as the rates on pine lumber originating on the Iron Mountain's own rails at Huttig. The higher rates charged on hardwood lumber were made by the addition of an arbitrary of 1½ cents to the Iron Mountain rates from Huttig, and this arbitrary, together with a division of 1½ cents out of the Iron Mountain rate, accrues to the Louisiana & Pine Bluff. The rate on the products of the complainant's mill was thus advanced, while the products of the proprietary mill at the same point move out upon the trunk line rate from the junction. Under the

> orders heretofore entered in this proceeding the proprietary company, through its tap line, can not properly receive any allowance in excess of $2 or $3 a car from the Iron Mountain, nevertheless on the products of the complainant's mill the tap line earnings aggregate 3 cents per 100 pounds.
>
> * * * * *
>
> Upon the whole record we therefore conclude and find that the published interstate rates on hardwood lumber applying from the mill of the complainant are and for the future will be unreasonable and unjustly discriminatory, in so far as they exceed the rates contemporaneously maintained on hardwood lumber originating on the rails of the St. Louis, Iron Mountain & Southern Railway Company at Huttig. We also conclude and find that the complainant has been unlawfully damaged by the Iron Mountain and the Louisiana & Pine Bluff to the extent that the through charges assessed on the products of its mill moving since May 1, 1912, have exceeded the junction point rate on hardwood.

On July 5, 1916, the Commission made a further report in Investigation and Suspension Docket No. 11, entitled *Louisiana & Pine Bluff Divisions*, 40 I. C. C., 470. After referring to the report in 34 I. C. C., 116, *supra*, the Commission said:

> A petition for rehearing filed by the Pine Bluff was granted, and the several questions raised thereon, as well as in the answer of the Wisconsin company, are now before us for consideration.

In our second supplemental report in *The Tap Line Case*, 31 I. C. C., 490, we revised the views announced in the original proceeding, thus conforming our own course in these matters to the rulings of the Supreme Court in *The Tap Line Cases*, 234 U. S., 1; and after a very careful study of the question we there fixed switching allowances and divisions for general application in this southwestern territory. For a haul of 3 miles or less under our order in that proceeding, which order is still in force throughout the territory, a tap line may receive a maximum allowance of $3 a car. And this is the amount which the Iron Mountain has been paying to the Pine Bluff on lumber traffic from both mills at Huttig interchanged at Dollar Junction. The Pine Bluff, however, is here asserting that its haul to that junction is in excess of 3 miles, and that under our order in the case last cited it is therefore entitled, not to a switching charge of $3 a car but to a division out of the through rate of 1½ cents per 100 pounds, or approximately $9 a car. It is important, therefore, that the distance from the two mills to Dollar Junction be accurately determined, and that, indeed, was one of the chief purposes in asking for a rehearing.

The measurements, which have been taken with care, show that the mileage actually traversed by the cars when moving between the mill of the Wisconsin company and the trunk line connection at Dollar Junction is 3.40 miles; and that between the Union plant and the same connection a car moves 3.25

miles. The mere statement of these distances, however, is not sufficient, especially in view of the facts in this case. It is shown of record that these distances include out of line or diverted movements to the track scales of 840 feet, in the case of shipments of the Wisconsin company, and of 4,380 feet, in the case of shipments from the Union mill. If these distances be deducted from the total haul the actual necessary mileage covered by the cars in direct movement to Dollar Junction is 3.24 miles from the Wisconsin mill and 2.41 miles from the Union mill. In other words, the Pine Bluff, in order to bring about an increase in its earnings, claims to be entitled to compensation for an out of line haul to the scale track of nearly a mile. Were we to lend our approval to any such arrangement not only would the Pine Bluff be placed in a more advantageous position than any other tap line in this territory performing a similar service, but such a ruling would open the way in the case of many tap lines for a relocation of their track scales so as to require a long back haul, and in that way to lay a basis for divisions or allowances very materially in excess of those fixed by the Commission for the distance covered by a direct movement from the mill to the junction. Under the circumstances we can not lend our sanction to the demand for increased allowances to be paid to the Pine Bluff from the Union mill.

The second question to be determined is whether Huttig or Dollar Junction is the proper point of interchange between the Pine

Bluff and the Iron Mountain. The record shows that ever since the construction of the tap line the interchange of cars has taken place at Dollar Junction, the necessary and ample facilities having been provided at that point. For a short period, during which the Iron Mountain was repairing its tracks near Dollar Junction, the interchange was made at Huttig. The only tracks at the latter point available for this purpose are the scale tracks heretofore referred to, the use of which, it is said, would seriously interfere with the handling of traffic. To provide facilities now for the interchange at Huttig would necessitate an entire reconstruction of the tracks at that point, the expense of which would be considerable. From the record before us no objection is found to the present practice of interchanging the cars at Dollar Junction. When made at that point the allowance by the Iron Mountain to the Pine Bluff on cars from the mill of the Wisconsin company should not exceed 1½ cents per 100 pounds; from the Union mill the allowance should not exceed $3 a car. These are the allowances that obtain under our second supplemental report, *supra*, throughout the entire territory. Should the interchange be effected at Huttig under our order in that case the Iron Mountain may pay to the Pine Bluff $2 a car on shipments from either mill.

On April 7, 1919, following general increases in the rates on lumber charged by the Director General of Railroads, the Commission made its Fifth Sup-

plemental Order in Investigation and Suspension Docket No. 11, which provided, in part:

> *It is ordered*, That from and after June 1, 1919, the switching charges or divisions which may be paid to tap lines parties hereto by the trunk lines out of the rates on interstate shipments of lumber and forest products from points on said tap lines shall not exceed the following amounts, namely: For switching a distance of 1 mile or less from the junction, $2.50 per car; over 1 mile and up to 3 miles from the junction, $3.50 per car; on shipments from points over 3 miles and not more than 6 miles from the junction, 2 cents per 100 pounds; over 6 miles and not more than 10 miles from the junction, 2½ cents per 100 pounds; over 10 miles and not more than 20 miles from the junction, 3 cents per 100 pounds; over 20 miles and not more than 30 miles from the junction, 3½ cents per 100 pounds; over 30 miles and not more than 40 miles from the junction, 4 cents per 100 pounds; over 40 miles from the junction, 4½ cents per 100 pounds: *Provided*, That these divisions are to be the net amounts that may be paid out of the trunk line rates from the junction, and when the rates from points on the tap lines are made by the addition of an arbitrary, the amount of such arbitrary shall accrue to the tap line.

On June 10, 1919, the Commission made an order, including as a part thereof the report of the same date in the premises, which is the subject of the

appeal now before this court. For convenient reference, the report and order are set forth in full:

INTERSTATE COMMERCE COMMISSION.

INVESTIGATION & SUSPENSION DOCKET NO. 11.
LOUISIANA & PINE BLUFF DIVISIONS.

Submitted January 8, 1919. Decided June 10, 1919.

Upon further consideration of the issues involved the Commission adheres to the findings announced in its original report herein, 40 I. C. C., 470, but on and after June 1, 1919, the Louisiana & Pine Bluff may receive the increased divisions permitted by the fifth supplemental order in *The Tap Line Case*.

SUPPLEMENTAL REPORT OF THE COMMISSION.

EASTMAN, *Commissioner:*

In our original report in this proceeding, 40 I. C. C., 470, dealing with the question of divisions to the Louisiana & Pine Bluff Railway, it was found that the distance from the Union mill at Huttig, Ark., one of the plants served by the tap line, to the connection with the St. Louis, Iron Mountain & Southern Railway, hereinafter called the Iron Mountain, at Dollar Junction was 2.41 miles. Including an out-of-line movement from the Union mill to the track scale, the distance was 3.25 miles, but the Commission held that an out-of-line or diverted movement to a track scale may not, under the second supplemental report in *The Tap Line Case*, 31 I. C. C., 490, be included in computing the distance upon which the division that a tap line may receive is to be determined.

It was further found that the maximum division which the tap line might properly receive for services performed, as fixed in the report last above cited, should not be more than $3 per car for the movement from the Union mill to Dollar Junction. This amount being within the maxima fixed in the order of July 29, 1914, entered in connection with the second supplemental report, no further order was deemed necessary. The Louisiana & Pine Bluff, however, refused to accept this amount of $3 per car for switching from the Union mill to Dollar Junction or to make settlement on that basis for services that had been rendered during the pendency of this proceeding. Thereupon, the Missouri Pacific Railroad, successor to the Iron Mountain, filed its petition for an order to give effect to our findings. Under a rule to show cause why such order should not be entered the Louisiana & Pine Bluff petitioned for further oral argument, which was granted, and the case was reargued before the Commission.

No question is or was raised as to the correctness of the facts stated in the Commission's previous report, but it was contended that the track scales, owing to inadequate drainage and other conditions, could not be located between the Union mill and the junction; that the out-of-line haul from the Union mill to the scale and thence to the junction with the Iron Mountain, a distance, as stated, of 3.25 miles, is actually necessary in the handling of the lumber; and that the Louisiana & Pine Bluff is entitled to compensation for services based on that distance. It is denied that any device for

securing larger divisions inheres in that method of computing the distance. The track scales are on the main line of the Missouri Pacific and are owned and maintained by that road. It also appears that the movement of the cars from the Union mill to the scales, and for part of the distance from the scales to Dollar Junction, is over the main line of the Missouri Pacific under a trackage arrangement. The evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line.

We have considered these contentions and the evidence submitted, but find no sufficient reason for modifying the findings stated in our previous report. Since that report was issued, however, the Commission has made its fifth supplemental order in *The Tap Line Case* increasing the divisions which may be received by tap lines from their respective trunk line connections 50 cents per car for switching three miles or less and one-half cent per 100 pounds on traffic hauled more than three miles. These increased divisions are made effective June 1, 1919.

We adhere to our original finding in this proceeding, with the modification that the divisions accorded the Louisiana & Pine Bluff for switching interstate shipments of lumber and forest products from the Union mill at Huttig, Ark., to Dollar Junction should not exceed $3 per car up to and including May 31, 1919, and $3.50 per car on and after June 1, 1919.

An appropriate order will be entered.

ORDER.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 10th day of June, A. D. 1919.

INVESTIGATION AND SUSPENSION DOCKET NO. 11. LOUISIANA & PINE BLUFF DIVISIONS.

This case being at issue and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its further findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It appearing, That on July 5, 1916, the Commission made its report in the above-entitled proceeding, 40 I. C. C., 470, which report is also hereby referred to and made a part hereof;

It further appearing, That in said report the Commission found that the respective distances from the mill of the Union Saw Mill Company and from the mill of the Wisconsin Lumber Company at Huttig, Ark., to the connection with the Missouri Pacific Railroad at Huttig, Ark., are less than 1 mile; that the distance from the mill of the Wisconsin Lumber Company to the connection with the Missouri Pacific Railroad at Dollar Junction, Ark., is 3.24 miles; and that the distance from the

mill of the Union Saw Mill Company to the connection with the Missouri Pacific Railroad at Dollar Junction, Ark., is 2.41 miles;

It is ordered, That the divisions accorded to the Louisiana & Pine Bluff Railway out of the rates on interstate shipments of lumber and forest products from mills on the rails of the Louisiana & Pine Bluff Railway at Huttig, Ark., prior to June 1, 1919, shall not exceed the maximum amounts fixed by the order of July 29, 1914, in *The Tap Line Case*, namely: For switching from the mills of the Wisconsin Lumber Company and the Union Saw Mill Company to the connection with the Missouri Pacific Railroad at Huttig, Ark., a distance of less than 1 mile, $2 per car; from the mill of the Union Saw Mill Company to the connection with the Missouri Pacific Railroad at Dollar Junction, Ark., a distance of 2.41 miles, $3 per car; from the mill of the Wisconsin Lumber Company to the connection with the Missouri Pacific Railroad at Dollar Junction, Ark., a distance of 3.24 miles, 1½ cents per 100 pounds.

It is further ordered, That the increased divisions fixed in the fifth supplemental order in *The Tap Line Case*, effective June 1, 1919, may be applied to shipments moving on and after that date.

Provided, That the allowances and divisions fixed herein shall be applied to shipments of lumber and forest products moving between May 1, 1912, and the respective dates of the divisions established in compliance with this order.

And it is further ordered, That a copy of this order be served upon the Louisiana & Pine Bluff Railway Company, the Missouri Pacific Railroad Company, and Georgia C. Hitchcock, special master in the matter of claims against the St. Louis, Iron Mountain & Southern Railway Company.

By the Commission,

[SEAL.] GEORGE B. MCGINTY,
Secretary.

Following general increases in rates pursuant to the report of the Commission in *Increased Rates, 1920*, 58 I. C. C. 220, the Commission entered, on September 8, 1920, its sixth supplemental order in Investigation and Suspension Docket No. 11 (Rec. 47), which provided, among other things:

It is ordered, That from and after the effective date of the increased rates authorized by the report of the Commission in *Increased Rates*, 1920, *supra*, the switching charges or divisions which may be paid to tap lines parties hereto by the trunk lines out of the rates on interstate shipments of lumber and forest products from points on said tap lines to the various groups defined in said report shall not exceed the following amounts, namely:

For switching a distance of 1 mile or less from the junction, $3.30 per car; over 1 mile and up to 3 miles from the junction, $4.50 per car; on shipments from points over 3 miles and not over 10 miles from the junction, 3 cents per 100 pounds; over 10 miles and not over 20 miles from the junction, 4 cents per 100 pounds; over 20 miles and not more than

> 40 miles from the junction, 5 cents per 100 pounds; over 40 miles from the junction, 6 cents per 100 pounds.

A petition was filed by the Louisiana & Pine Bluff Railway Company in the District Court of the United States, Western District of Arkansas, Texarkana Division (Rec. 1), in which it was alleged, in substance, that the Commission abused its power and acted arbitrarily in making its order of June 10, 1919, *supra*, in Investigation and Suspension Docket No. 11, *Louisiana & Pine Bluff Divisions*, and prayed that the order be set aside and its enforcement enjoined.

The Commission filed an answer (Rec. 32) and the United States a motion to dismiss and answer (Rec. 37).

Upon hearing the district court made a decree dismissing the petition or bill of complaint for want of equity (Rec. 41). A memorandum opinion was delivered (Rec. 44) in which the district court accepted the Commission's interpretation of its own order and called attention to the fact that only a portion of the evidence before the Commission was presented to the court, thus precluding a review of the Commission's findings on the ground of insufficient evidence.

The case is before the Supreme Court on appeal by the Louisiana & Pine Bluff from the above-mentioned decree.

The assignments of error (Rec. 42) allege in substance that the district court erred in accepting the Commission's interpretation (40 I. C. C. 470, 471) of its order of July 29, 1914, as contemplating a direct

haul from the loading point to the junction point without any diversion not made necessary to safely and properly reach such junction point, and in refusing to review the Commission's findings in its report and order of June 10, 1919, *supra*.

ARGUMENT.

I. The Commission's order was made after full hearing and is based upon the entire record, which covers, in addition to appellant, numerous other tap lines operated under somewhat similar circumstances.

In the statement of the case an effort has been made to show the court the pains and thoroughness with which the Commission has dealt with Investigation and Suspension Docket No. 11. It may confidently be said that in few proceedings before the Commission have there been more elaborate investigations or a greater volume of evidence adduced than in this proceeding.

One of the principal purposes of the investigation was to eliminate unjust discrimination and undue prejudice. In order to accomplish this a broad survey of the entire field was necessary, and this was made. Not only was the situation with regard to each tap line covered by the evidence, but the Commission was able by considering the entire mass of evidence before it to weigh the merits of the various contentions made and determine what administrative action was necessary in order to prevent unjust discrimination and undue prejudice.

That it was the Commission's duty to take such administrative action is beyond question. In *Tap*

Line Cases, supra, at page 28, the Supreme Court said:

> It is doubtless true, as the Commission amply shows in its full report and supplemental report in these cases, that abuses exist in the conduct and practice of these lines and in their dealings with other carriers which have resulted in unfair advantages to the owners of some tap lines and to discriminations against the owners of others. Because we reach the conclusion that the tap lines involved in these appeals are common carriers, as well of proprietary as nonproprietary traffic, and as such entitled to participate in joint rates with other common carriers that determination falls far short of deciding, indeed does not at all decide, that the division of such joint rates may be made at the will of the carriers involved and without any power of the Commission to control. That body has the authority and it is its duty to reach all unlawful discriminatory practices resulting in favoritism and unfair advantages to particular shippers or carriers. It is not only within its power, but the law makes it the duty of the Commission to make orders which shall nullify such practices resulting in rebating or preferences, whatever form they take and in whatsoever guise they may appear. If the divisions of joint rates are such as to amount to rebates or discriminations in favor of the owners of the tap lines because of their disproportionate amount in view of the service rendered, it is within the province of the Commission to reduce the amount so

that a tap line shall receive just compensation only for what it actually does.

In the district court appellant set forth in its petition excerpts from the evidence which, it contended, constituted "a transcript of all the testimony before the said Commission on the point involved." The Commission did not agree with appellant's position and insisted that it had before it and considered all of the evidence introduced in Investigation and Suspension Docket No. 11. In this, as shown by the memorandum opinion of the district court, the Commission was sustained by that court. A similar situation was presented in *O'Keefe* v. *United States*, 240 U. S., 294. In the course of its opinion the Supreme Court said, page 302 et seq:

> It is insisted that there was no evidence before the Commission to sustain its finding to the effect that any allowance or division in excess of the limits prescribed would result in undue preference and unjust discrimination. This, of course, is to be tested by a consideration of the evidence that was before the Commission. The report and supplemental report of April 23 and May 14, and the orders of May 14 and October 30, 1912, and the oral evidence and main exhibits before the Commission from the beginning of the tap-line investigation to the making of the order last mentioned were offered in evidence. Appellant, however, has printed only a small part of the testimony, being that which especially relates to the Louisiana & Pacific Railway, its organization, ownership, manner and cost of

construction, operating revenue and expenses, accumulated surplus, etc. But, besides these details as to this line, the Commission had before it, as its reports show, a mass of evidence relating to numerous other tap lines, operated under somewhat similar circumstances, including evidence as to the allowances actually made to them out of the joint rate. Evidence of what was allowed on these tap lines had a tendency to show what was reasonable and therefore permissible upon other tap lines, including the Louisiana & Pacific. It is said there was no evidence to enable the Commission to fix a just compensation to that line for a haul of a given number of miles as compared with the just compensation for a haul of a greater or lesser number of miles; no evidence as to terminal expenses, or cost of road haul, or the relation between these factors, or as to other elements which should be taken into account in fixing a division according to the length of haul. But the evidence showed that some limitation was called for, and, in general at least, furnished the materials upon which to base it. A tribunal such as the Interstate Commerce Commission, expert in matters of rate regulation, may be presumed to be able to draw inferences that are not obvious to others. Nor can it be said that the Commission's action was arbitrary because, while classifying all the service for distances up to 3 miles from junction as switching, and allowing for this a division of $2 and $3 per car, allowances for all distances above 3 miles are based upon mileage. It is admitted that distance is an

> element properly to be considered; but appellant insists that terminal service, the origin of traffic, etc., are more important elements. This is an administrative question. The tapline problem is exceedingly complex, and the importance of a general rule based upon simple elements easily ascertained is obvious. We are not able to say that the adoption of the mileage basis is, under the circumstances, sufficient to sustain a charge of arbitrary action.

In *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S., 117, the plaintiff had brought suit under section 16 of the act to regulate commerce, as amended, to recover certain amounts awarded to him against defendants in a reparation order made by the Commission. The principal ground of defense was "that there was not sufficient evidence before the Commission to sustain its order of reparation." The Supreme Court said, page 125:

> The transcript of the testimony taken by the Commission, as introduced in evidence in the District Court, forms the basis of the decision of the Circuit Court of Appeals that the reparation order was unsupported by evidence. But the transcript shows that important documentary evidence was introduced, and furnished the principal foundation for the findings made. This documentary evidence (except the single sheet offered for purposes of illustration) was not introduced in the District Court, in order, as stated by counsel, to "avoid introducing a number of papers that would almost fill a farm wagon."

> But obviously we hardly could sustain a decision rejecting the reparation order upon the ground that there was not sufficient evidence before the Commission to support it when the whole of the evidence that was before the Commission was not produced.

II. Appellant rests its case upon general administrative rulings or expressions of the Commission, and at the same time objects to accepting the specific administrative ruling regarding its situation.

There is a certain inconsistency in appellant's position which the court has undoubtedly noticed. That is, appellant rests its case upon general administrative rulings or expressions of the Commission respecting (*a*) the maximum amounts which properly may be paid as divisions or allowances to tap lines parties to Investigation and Suspension Docket No. 11, and (*b*) the points where carload freight should be weighed; but objects to accepting the specific administrative ruling regarding its situation. It is obvious that, this being a matter necessitating the exercise of administrative discretion, the Commission's finding that this particular situation demands a certain treatment must govern to the exclusion of general findings or statements. In *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, *supra*, the Supreme Court said (p. 136), regarding administrative rulings of the Commission:

> Treating it as an administrative regulation, it of course constituted no limitation upon the jurisdiction of the Commission, * * *. In any event, the Commission had power to disregard the regulation, as in effect it did by recognizing the assignments in this case.

Appellant places great reliance upon the Commission's decision in *Detroit Coal Exchange* v. *M. C. R. R. Co.*, 38 I. C. C., 79. That case and the present one can hardly be called parallel cases in view of the fact that they relate to different commodities, different carriers, different territories, and that the *Detroit Coal Exchange case* brings in no question of excessive payments to tap lines or industrial railroads. If there is sufficient similarity to the case at bar for any argument to be predicated upon the case cited, it would seem to be one adverse to appellant's contention regarding the necessity for weighing cars at point of origin, for in the *Detroit Coal Exchange case*, *supra*, the controversy was with respect to charges for weighing and reweighing at destination inbound cars of coal.

In this connection, and as indicating the diverse conditions under which carload freight is weighed and the consequent necessity for administrative rather than judicial consideration of the problems arising in connection with such weighing, reference may be had to the decision of the Supreme Court in *Great Northern Ry. Co.* v. *Cahill*, 253 U. S., 71, in which it was said, among other things, page 73:

> It was indisputably established * * * that the universal rule on all railroads throughout the United States is to determine the weight of cattle shipped in carload lots, for the purpose of ascertaining the freight charges, not by weight taken on scales at the point of shipment, but by a track scales at or adjacent to the point of delivery * * *.

III. The determination of a reasonable maximum division or allowance for appellant is essentially an administrative question within the jurisdiction of the Commission.

Appellant apparently confuses the functions of the Commission with those of the courts. The Commission's order prescribing maximum divisions or allowances which might be paid to tap lines generally by their trunk line connections out of the through rates was sustained by the Supreme Court in *O'Keefe v. United States, supra.* The Commission has considered appellant's situation specifically and has determined the maximum amount which may be paid to it, this action being an exercise of the Commission's administrative functions. Upon a consideration of the record, and keeping in view the necessity for avoiding undue preference of the appellant and the Union Sawmill Company and undue prejudice to other tap lines and mills, the Commission found that the interchange of cars might reasonably be made at Dollar Junction, although this involved a longer haul and a larger payment to appellant than if the interchange was made at Huttig. It further found that the distance necessarily covered by a car of lumber moving from the Union mill to Dollar Junction is 2.41 miles. In other words, the Commission found that the maximum divisions which might properly be paid to appellant for the services necessarily rendered in moving a car of lumber from the Union mill to Dollar Junction were $3 per car up to and including May 31, 1919, and $3.50 per car on and after June 1, 1919, and for convenience used the

scale of rates theretofore established by it and the distance of 2.41 miles. Under the Sixth Supplemental Order, *supra*, the division has been $4.50 per car from and after August 26, 1920.

The earnings per car on the divisions found reasonable by the Commission and those contended for by appellant are illustrated as follows:

	Found reasonable by Commission.	Sought by appellant, based on carload weight of 60,000 pounds.
Prior to June 1, 1919	$3.00	$9.00
On and after June 1, 1919	3.50	12.00
On and after August 26, 1920	4.50	18.00

That is, at the present time, under the Commission's orders, appellant can receive no more than $4.50 on each car of lumber and forest products moving from the Union mill north to Dollar Junction. Appellant seeks to have included in the distance a movement south to the track scale and thereby to secure greater compensation. But the Commission has held:

> The evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line.

If appellant can persuade this court to agree with it and to substitute the judgment of the court for that of the Commission, it can greatly increase its earnings as shown in the illustration by hauling the car over the tracks of the trunk line and weighing it on the trunk line's track scale. This would, how-

ever, be contrary to the principles announced in many cases, including *Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S., 452, 470; *Int. Comm. Comm.* v. *Union Pacific R. R.*, 222 U. S., 541, 547; *Procter & Gamble* v. *United States*, 225 U. S., 282, 297; *Atchison Railway Co.* v. *United States*, 232 U. S., 199, 220; *United States* v. *Louis. & Nash. R. R.*, 235 U. S., 314, 320; *Manufacturers Ry. Co.* v. *United States*, 246 U. S., 457, 481, 488; and *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S., 57, 62. These cases hold, among other things, that the courts will confine their review of administrative findings and conclusions of the Commission to determining whether there have been violations of the Constitution, a want of conformity to statutory authority, or an arbitrary exercise of authority; that is, in short, whether or not the Commission has abused the great powers conferred upon it. As was said in *Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, *supra*, the court will not—

> * * * usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised.
>
> Power to make the order and not the mere expediency or wisdom of having made it is the question.

What constitutes undue prejudice is a question of fact, not of law, presenting an administrative question, and this would seem equally true as to the course necessary to prevent or remove such undue

prejudice. In *Seaboard Air Line Ry. Co.* v. *United States, supra*, the court said:

> Moreover, the determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority.

CONCLUSION.

As appears from the statement of the case, the situation of the appellant has been the subject of four reports by the Commission. This can hardly be called denial of due process of law. The finding of the Commission is that it is necessary in moving a car of lumber or forest products from the Union mill to Dollar Junction to haul it 2.41 miles. There is nothing in the order of the Commission to require a longer haul than this; and the Commission has found that the evidence does not show the necessity for the movement of the car by appellant over the trunk line's tracks to the trunk line's track scale. On the contrary, it has said:

> Were we to lend our approval to any such arrangement not only would the Pine Bluff be placed in a more advantageous position than any other tap line in this territory performing a similar service, but such a ruling would open the way in the case of many tap lines for a relocation of their track scales so as to require a long back haul, and in that way

> to lay a basis for divisions or allowances very materially in excess of those fixed by the Commission for the distance covered by a direct movement from the mill to the junction.

Apparently the contention in the petition filed in the district court, that the order complained of is confiscatory, has been abandoned. In any event, it has no support in anything of record and therefore will not be discussed.

The maximum amount which may properly be paid to appellant relates to the reasonableness of rates and is peculiarly within the province of the Commission; there was substantial evidence before the Commission regarding not only the appellant but other tap lines in the same territory; and appellant has been denied no constitutional right.

It is respectfully submitted that the decree of the district court should be affirmed.

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